

When asked what were the implications for the Applicant's appeal of the Gatenbys' decision under this new policy, the new Chairman of Sydney Gas Ltd, Mr Michael Knight was reported in the Australian Financial Review of 19 September 2005 as confirming that this appeal will continue to be pursued by the Applicant.

It is listed for mention on 14 October 2005 in the Supreme Court of New South Wales and a hearing date for the appeal is expected in 2006.

On 14 October 2005 Sydney Gas announced that it would withdraw its Gatenby Appeal in the Supreme Court. The CEO of Sydney Gas was quoted as saying:

Sydney Gas stands by the view that part of the decision of the Chief Mining Warden was wrong at law. However, since the company has now decided not to drill on the Gatenby land, it would not be appropriate to continue the matter before the Court.

### **FIDUCIARY DUTY OF FULL AND ACCURATE DISCLOSURE OWED TO JOINT VENTURER\***

*Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (Mason P, Giles and Tobias JJA)

*Joint venture – Fiduciary duties – Constructive trusts*

#### **Background**

Say Dee Pty Ltd (Say-Dee) and Farah Construction Pty Ltd (Farah) entered into a joint venture to purchase and redevelop a property. Farah was responsible for progressing the development application which was ultimately refused by the relevant Council on the ground that the property was too narrow so that the redevelopment could only be achieved by acquiring two adjoining properties.

On the basis of this information, Mr Elias (controlling Farah) caused various parties associated with Farah to purchase the adjoining properties.

Say-Dee started proceedings against Farah for breach of fiduciary duty. The primary judge held that Farah was under no fiduciary duty to disclose to Say-Dee the opportunity to acquire the adjoining properties as this was outside the scope of the joint venture.

Say-Dee appealed the decision of the primary judge to the Court of Appeal.

#### **Arguments**

Farah successfully argued before the primary judge that the joint venture was confined to the redevelopment of the property the joint venture intended to purchase and that even if it disclosed

---

\* Gilles Cardonnel, Consultant, Allens Arthur Robinson.

the information it received from the Council to Say-Dee, Say-Dee would have not been in a position financially to participate in the purchase of the adjoining properties.

### **Decision**

The Court of Appeal allowed the appeal.

The Court held that Farah, by using the valuable information obtained from the Council without the fully informed consent of its co-venturer, breached the following fiduciary duties:

- refrain from withholding information or acting in a manner that would bring its personal interests into conflict with its fiduciary obligations (referred as the “no conflict rule”); and
- refrain from withholding information or acting in a manner which would result in Farah’s making a profit by using the undisclosed information (referred as the “non profit rule”).

The fiduciary duties of Farah extended to the full and accurate disclosure to Say-Dee of all matters pertinent to the redevelopment and obtained in the course of carrying out joint venture activities. This disclosure obligation applied even if the other joint venturer was not in a financial position to pursue the opportunity that could arise from having the information, which was the case here.

The Court also held that the parties associated with Farah who acquired the adjoining properties at Farah’s request and without knowing about the breach of fiduciary duty by Farah held their respective interests in these properties on constructive trust for the joint venturers as they fell within the “recipient liability limb” of *Barnes v Addy* (1874) LR 9 Ch App 244.

## **TRIGGER FOR PRE-EMPTIVE RIGHT PROVISION IN JOINT OWNERSHIP AGREEMENT\***

*GPT RE Limited v Lendlease Real Estate Investments Limited & Ors* (Supreme Court of New South Wales, White J, 27 September 2005) [2005] NSWSC 964

*Joint Venture - Pre-emptive rights – put and call options – dealings – wishing to deal*

### **Summary**

GPT sought declarations and injunctions against Lendlease, GPT’s co-owner of the Sunshine Plaza Shopping Centre in Maroochydore. Lendlease had alleged in correspondence that by entering into a conditional agreement to sell part of its interest in the property to Westfield, GPT had triggered a pre-emptive right provision in the joint ownership agreement which would permit Lendlease to compulsorily acquire GPT’s interest. The agreement to sell to Westfield was conditional on Lendlease waiving its pre-emptive rights under the joint ownership agreement. The Court enjoined Lendlease from proceeding with the compulsory acquisition provisions of the contract on the basis that, inter alia, the conditional nature of the sale agreement to Westfield did not trigger Lendlease’s pre-emptive rights.

---

\* Megan Brayne, Lawyer, Allens Arthur Robinson.